

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

**THE HON'BLE THE CHIEF JUSTICE MR.H.L.DATTU
&
THE HONOURABLE MR. JUSTICE K.T.SANKARAN**

FRIDAY, THE 26TH OCTOBER 2007 / 4TH KARTHIKA 1929

ST.Rev..No. 161 of 2007

(TA.77/2006 of KERALA SALES TAX APPELLATE TRIBUNAL, ADDL.BENCH, PALAKKAD)

REVISION PETITIONER/APPELLANT/ASSESSEE:

M/S. TIP TOP FURNITURE INDUSTRIES,
KOTTAKKAL.

BY ADV. DR.K.B.MOHAMMEDKUTTY(SR)
ADV. SRI.K.M.FIROZ

RESPONDENT/RESPONDENT/REVENUE:

THE STATE OF KERALA,
REPRESENTED BY THE SECRETARY TO GOVERNMENT,
TAXES DEPARTMENT,
SECRETARIAT,
THIRUVANANTHAPURAM.

BY SPECIAL GOVERNMENT PLEADER SHRI VINOD CHANDRAN.

THIS SALES TAX REVISION HAVING COME UP FOR
ADMISSION ON 26/10/2007, THE COURT ON THE SAME DAY PASSED
THE FOLLOWING:

H.L.DATTU, C.J. & K.T.SANKARAN,J.

S.T.REV. NO. 161 OF 2007

Dated this the 26th October, 2007

ORDER

H.L.DATTU, C.J.

This revision petition is filed by a registered dealer against the findings of the authorities under the Act and the Tribunal.

2. The revision petitioner is a registered dealer both under the provisions of the Kerala General Sales Tax Act, 1963 ('KGST Act' for short) and the Central Sales Tax Act.

3. The petitioner has imported medical mattresses which were supported by bill of entry and other documents. After clearance from the Port, the goods were being transported to the destination. The Intelligence Wing of the Department had intercepted the vehicle and detained the vehicle as well as the goods on the ground that the person in charge of the vehicle did not carry the necessary documents as required under Section 29(2) of the KGST Act.

4. The petitioner got the vehicle and the goods released after depositing the bank guarantee as directed by the Intelligence Officer of the Department.

5. Thereafter, proceedings under Section 29A(4) of the Act had been initiated against the petitioner and notice, dated 17.10.2003, had been issued by the authorities. After receipt of such notice, petitioner had filed an application for adjournment of the proceedings to a subsequent date. The authority had conceded to the request made in the application for adjournment. Thereafter, one more notice, dated 14.11.2003, was issued and served on the petitioner. In spite of services of such notice, the petitioner did not produce the books of accounts and other documents in support of his case. Thereafter, the Intelligence Officer

has proceeded to pass an order, dated 2.1.2004.

6. The findings and conclusions reached by the Intelligence Officer is as under:

“Thereafter the file has been forwarded to me for further enquiries as per the order of the Deputy Commissioner (Intelligence), Ernakulam. The notice read as paper No.4 is issued to M/s.Tip Top Furniture, Kottakkal for the verification of their books of accounts and giving an opportunity to hear them on 29.10.2003. The party has filed an adjournment petition on 29.10.2003 and not turned up till this time. Therefore, I have no other alternate but to finalise the proceedings as per the records available before me. The defects noticed by the Intelligence Inspector is that no documents required under the K.G.S.T.Act was accompanied for the transport. As the party has not turned up or produced any evidence before me, I find that the finding of the Intelligence Inspector that there was an attempt to evade payment of tax is correct and therefore the following order is issued.

ORDER NO.VC-506/2003-2004, DATED: 2.1.2004

In the circumstances stated above and as per the powers conferred upon me under section 29A(4) of the K.G.S.T.Act 1963, I hereby impose a penalty of Rs.57,600/- upon M/s.Tip Top Furniture Industries, Kottakkal. The Bank Guarantee for Rs.57,600/- of the State Bank of India, Calicut is adjusted towards penalty.”

7. Aggrieved by the said order passed, the petitioner had filed an appeal before the Deputy Commissioner (Appeals), Ernakulam. The Appellate Authority, after affording an opportunity of hearing to the assessee, has rejected the appeal by order dated 20.1.2006. In that order, the Appellate Authority has stated as under:

“ I have gone through the contentions and perused the records. The goods were detained and security was collected for release since the transport was not accompanied with documents as per Kerala General Sales Tax Act. The goods were not accompanied with delivery note as contemplated under the Kerala General Sales Tax Act. The purchase bill and other documents accompanied with the transport were not covered by the Act and the appellant could have used delivery note which is a document

that could have been accompanied with especially when the appellant is a registered dealer. If the goods were not detained and security was not collected there would have been every possibility that these goods will go unaccounted. In the circumstances attempt of evasion of tax is proved beyond doubt and the imposition of penalty thereon is justified. Therefore, the contentions raised by the appellant and the case laws relied in the appeal are not applicable to the facts and circumstances of the case and the penalty is confirmed and appeal is dismissed.”

8. Disturbed by the said order passed by the First Appellate Authority, the petitioner had filed a second appeal before the Kerala Sales Tax Appellate Tribunal, Palakkad in T.A.No.77 of 2006. The Tribunal by its order dated 16.6.2006, has rejected the appeal and in that, the Tribunal has stated as under:

“The Point:

On a detailed evaluation and analysis of entire contentions and evidence on record coupled with the plea of the appellant would conclusively prove the case of the respondent.

It is apparently evident on the face of record that both the authorities below came to a concurrent conclusion disallowing the claim of the appellant. There is no error or infirmity in the order passed by the authorities below. Therefore no interference of this Tribunal is called for. However the counsel for the appellant, pressed into service V.V.Agency v. State of Kerala, 2003 STC Vol.129 P.129, (1998) 6 KTR 150 (Ker.). Both these authorities will not come to the rescue of the appellant. Thus this point is only to be answered in favour of the respondent. It is answered accordingly.

In the result this appeal fails, it is devoid of any merits and substance. Hence this appeal is dismissed confirming the order of the lower appellate authority.”

9. Aggrieved by the orders passed by the assessing authority as well as by the Tribunal, the assessee is before us in this revision petition filed under Section 41 of the KGST Act.

10. The questions of law framed by the assessee for our consideration and decision are as under. They are the following:

- “i) Whether on the facts and in the light of statutory provisions contained in Section 29 and 29A of the KGST Act, the Appellate Tribunal is justified in law in confirming the penalty imposed when the imported commodity was on its way to petitioner's shop?
- ii) Whether on the face of the finding of the Appellate Tribunal, has not the Appellate Tribunal failed in applying its mind to the question at issue?”

11. Dr.K.B.Mohamedkutty, learned senior counsel appearing for the petitioner/assessee would submit, firstly, that the Intelligence Officer, before whom the proceedings were pending, did not afford sufficient opportunity of hearing to the petitioner and, therefore, the order passed by the Intelligence Officer is not only arbitrary but also illegal and in violation of the principles of natural justice. Secondly, the learned senior counsel would contend that there must be a positive finding by the Intelligence Officer that there is an attempt to evade payment of tax and in the absence of such a finding, the Intelligence Officer was not justified in imposing any penalty under Section 29 of the KGST Act. In support of the said submission, the learned senior counsel invites our attention to the observations made by a Division Bench of this Court in the case of **K.G.Thommen v. State of Kerala** (1994 K.L.J. (Tax Cases) 477).

12. Section 29 of the KGST Act provides for establishment of check post and inspection of goods in transit. Sub-section (2) of Section 29 of the KGST Act is relevant for the purpose of this case. Therefore, the said provision is extracted here. It is as under:

- “(2) No person shall transport within the State across or

beyond the notified area any consignment of goods exceeding such quantity or value as may be prescribed by any vehicle or vessel, unless he is in possession of,--

(a) either a bill of sale or delivery note or way bill or certificate of ownership containing such particulars as may be prescribed, and

(b) a declaration in such form and containing such particulars as may be prescribed when the vehicle or vessel enters or leaves the State limits.

13. If, for any reason, the person in charge of the vehicle or the owner of the goods does not produce the documents prescribed under sub-section (2) of Section 29 of the KGST Act, the Act provides for levy of penalty by initiating proceedings under sub-section (4) of Section 29 of the KGST Act.

14. Now coming to the fact situation. The assessee is a dealer registered under the provisions of the KGST Act. According to him, he has imported medical mattresses. In support of the import of the aforesaid commodity, the petitioner has the bill of entry and other documents. Those documents would only permit the petitioner to get clearance from the Port. When the petitioner intends to transport the goods after such clearance from the Port to his destination, he is expected to carry the documents as prescribed under sub-section (2) of Section 29 of the KGST Act. If those documents are not produced by the person in charge of the vehicle or the owner of the goods when it is intercepted or checked by the Intelligence Officer of the Department, the Intelligence Officer is authorised to detain the vehicle and then release the vehicle and the goods carried in the vehicle after accepting the security amount that may be demanded from the person in charge of the goods vehicle or the owner of the goods.

15. In the instant case, apart from the bill of entry, the person in charge of the goods vehicle did not produce any other document that is prescribed under sub-section (2) of Section 29 of the KGST Act when the vehicle was intercepted by the Intelligence Officer of the Department. Therefore, the said vehicle had been detained and security amount was demanded. Petitioner, in fact, had offered a bank guarantee for the release of the goods.

16. When the matter was posted before the Intelligence Officer for initiating proceedings under sub-section (4) of Section 29 of the Act, the authority concerned had issued a notice, dated 17.10.2003, to the petitioner, directing the petitioner to appear before him on 29.10.2003. On that day, the petitioner had filed an application for adjournment, requesting the Intelligence Officer to accommodate him for filing objections and for producing the books of accounts. The request made in the application for adjournment was conceded by the Intelligence Officer and thereafter, had issued one more notice, dated 14.11.2003, to the petitioner. Though the said notice was served on the petitioner, he did not choose to appear before the Intelligence Officer of the Department. Since the petitioner did not support his case, the authorities has come to the conclusion that the suspicion entertained by the Intelligence Officer of the Department that there was an attempt to evade payment of tax due under the Act is correct and has concluded the proceedings by observing that though an opportunity was given to the petitioner, that opportunity was not utilised by the petitioner and, therefore, he has no other alternative but to accept the suspicion entertained by the Intelligence Officer of the Department, who had intercepted the vehicle.

17. It is the case of the petitioner that no opportunity of hearing was given

to the petitioner. In our view, his assertion has no basis. The concept of principles of natural justice could be applied in such of those cases, where 'no notice', 'no opportunity' and 'no hearing' is given to a person who would be affected by the order that may be passed, but not in those cases where an opportunity was given, but was not made use of by the other side. In the instant case, opportunity was given to the petitioner by the Intelligence Officer to substantiate his reply filed to the notice issued, but the petitioner failed to make use of that opportunity. Therefore, it cannot be said that the order passed by the authority is arbitrary and in violation of principles of natural justice. Therefore, in our opinion, the submission of the learned senior counsel that sufficient opportunity of hearing was not given to the petitioner cannot be accepted by us. Therefore, the first submission, in our opinion, has no merit and it requires to be rejected. Accordingly, it is rejected.

18. Learned senior counsel would submit that the authorities can proceed and pass an order under sub-section (4) of Section 29 of the Act if it finds that there is evasion of payment of tax due under the Act and not otherwise. In support of the said submission, as we have already noticed, learned senior counsel has relied upon the observations made by a Bench of this Court in ***K.G.Thommen's case*** (supra). In the said decision, a Bench of this Court has observed as under:

“Under section 29A (2) of the KGST Act, it is open to an officer to detain the goods which are under transport, if the goods are not covered by proper and genuine documents and the officer has reason to suspect that there is an attempt to evade payment of sales tax. The transport of goods can be permitted to be proceeded with, after obtaining security for double the amount of tax likely to be evaded. After proper enquiry if the officer finds that

there has been attempt to evade the tax due under the Act, it is open to the officer under section 29A(4) of the Act, to impose on the owner of the goods a penalty not exceeding twice the amount of tax attempted to be evaded. Two things are fairly clear on a reading of Section 29A(2) and Section 29A(4) of the Act. They are: (1) the transport of the goods should be without proper and genuine documents and (2) the officer should be satisfied that the person transporting the goods is attempting to evade payment of tax due under the Act. We are of the view that mere transport of the goods without proper documents may enable the officer to check and detain the goods. It is open to the officer to make enquiries. But, in order to levy a penalty under section 29A (4) of the Act, the Officer should positively find that there has been an attempt to evade tax due under the Act. Mere fact that the transport of goods was not accompanied by proper documents by itself will not be sufficient to attract levy of penalty under Section 29A(4) of the Act. It is essential that the officer should find that there has been an attempt to evade tax due under the Act and that should be based on proper material."

19. This Court, after analysing the provisions of Section 29A(2) and 29A(4) of the KGST Act, has come to the conclusion that provisions of Section 29A(4) can be pressed into service by the Department only in two circumstances. Firstly, the transport of the goods should be without proper and genuine documents; and secondly, the officer should be satisfied that the person transporting the goods is attempting to evade payment of tax due under the Act.

20. In the instant case, there is a positive finding by the Intelligence Officer of the Department that the petitioner, while transporting the goods, did not carry the documents as prescribed under sub-section (2) of Section 29 of the KGST Act. Secondly, after affording an opportunity for hearing, the Intelligence Officer has positively come to the conclusion that there is an attempt to evade payment of tax due under the Act. In that view of the matter, in our opinion, the reliance on the decision by the learned senior counsel to support his case, would not assist

him in any manner whatsoever and in fact would assist the revenue.

21. In the instant case, the petitioner, while transporting the goods from the Port to destination, did not carry the documents as prescribed under sub-section (2) of Section 29 of the Act. This has been noticed by all the authorities under the Act and also by the Tribunal. Since the person in charge of the goods vehicle or the owner of the vehicle did not carry the documents which are necessary for transportation of the goods, they have come to the conclusion that there is an attempt to evade payment of tax due under the Act and accordingly levied penalty as provided under sub-section (4) of Section 29 of the KGST Act. In our opinion, the findings and conclusions reached by the authorities under the Act and the Tribunal cannot be set aside either as arbitrary or illegal or contrary to the provisions of the Act or the law declared by this Court. In that view of the matter, the Revision Petition fails. Accordingly, it requires to be rejected and is rejected.

Ordered accordingly.

(H.L.DATTU)
Chief Justice

(K.T.SANKARAN)
Judge

ahz/dk